

BEFORE THE  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268-0001

Complaint on Electronic Postmark®

Docket No. C2004-2

**INITIAL BRIEF OF THE UNITED STATES POSTAL SERVICE**

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J Foucheaux, Jr.  
Chief Counsel, Ratemaking

Eric P. Koetting  
Joseph F. Wackerman

Washington, D.C. 20260-1137  
(202) 268-2992; Fax -5402  
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In accordance with Presiding Officer's Ruling No. C2004-2/7 (August 18, 2006), the United States Postal Service hereby submits its initial brief in support of its position that the Commission should find that the complainant has not carried its burden to show the complaint to be justified.

### **Procedural History**

On February 25, 2004, a complaint was filed by DigiStamp pursuant to section 3662 of the Act, concerning a service provided by the Postal Service as "USPS Electronic Postmark™ (EPM)." The specific relief sought by the Complaint was that the Commission submit to the Governors of the United States Postal Service a recommended decision rejecting as unsupported the Postal Service's provision of EPM.

On April 26, 2004, the Postal Service filed both an Answer and a Motion to Dismiss. In the Answer, the Postal Service denied that EPM is a class of mail, a type of mail service, or a service ancillary to mail. In its Motion to Dismiss, the Postal Service contended that a Postal Service determination to treat a service as nonpostal is not reviewable by the Commission, and that, even if it were, EPM is not a postal service for purposes of chapter 36 of title 39. DigiStamp responded in opposition to the Motion to Dismiss on May 3, 2004.

On March 3, 2006, the Commission issued Order No. 1455, denying (in part) the Motion to Dismiss, and noticing the institution of a proceeding to address the matters raised in the complaint. Specifically, the Commission determined the need to hold hearings in order to address factual matters relating to the nature of the service provided, and thereby be able to reach conclusions on the threshold postal/nonpostal

issue in light of its recently adopted new definition of a postal service. Order 1455 at 17-18.

In accordance with Order No. 1455, the direct testimony of Digistamp witness Borgers was filed on April 17, 2006. Discovery was directed at that testimony by the Postal Service and by AuthentiDate. (In addition to the participation of DigiStamp, the Postal Service, and the OCA, intervention notices were filed by AuthentiDate and David Popkin.) No party requested oral cross-examination of Mr. Borger's direct testimony.

Responding to that testimony, the Postal Service filed the rebuttal testimony of Thomas Foti on July 7, 2006. Discovery was directed at witness Foti by DigiStamp and the OCA. A hearing on the testimony was conducted on August 15, 2006. Finally, the surrebuttal testimony of Mr. Borgers was filed on behalf of DigiStamp on September 14, 2006. No oral cross-examination of that testimony was requested, although the Postal Service on September 20 moved to strike a portion of the testimony as argument, not entitled to evidentiary status. The motion to strike was denied on October 4, 2006.

### **SUMMARY OF ARGUMENT**

When the Postal Service initiated USPS EPM, and again when the current provider was chosen, the Postal Service had to determine whether EPM would be a postal service, such that the service could not be initiated without seeking a recommended decision on rates and terms of service from the Postal Rate Commission, or whether it would be another of many nonpostal services, which the Postal Service is authorized to establish unilaterally. Applying the prevailing standards previously stated by the Postal Service, the Commission, and the courts, the conclusion was easily reached that, because USPS EPM has no relation to the routine functions associated

with the carriage of hard copy mail, it is a nonpostal service. Consequently, the Postal Service identified no obligation to consult the Commission under Chapter 36 of title 39, and proceeded to establish the service on its own, pursuant to other statutory provisions.

The complainant now challenges the determination by the Postal Service to initiate USPS EPM without consulting the Commission, alleging that course of action to be unlawful. The Postal Service submits that this effort by the complainant suffers from a number of flaws. First, the limited role of the Commission under the statutory complaint provision does not include the authority to intrude into the Postal Service's determination to initiate a service which it has concluded to be nonpostal. Second, even if the Commission had the authority which it lacks, USPS EPM must be considered a nonpostal service for purposes of evaluating this complaint. Under the long-established standards for the identification of postal services, an exclusively electronic service such as USPS EPM cannot be a postal service. Although the Commission earlier this year promulgated a rule which specifically was intended to expand the scope of the Commission's authority to include certain electronic services, the principle of retroactivity precludes application of the new rule in a proceeding such as the instant complaint, which was pending at the time the rule was adopted. Finally, even if that new rule had any relevance (which it does not), the essential nature of the service provided by USPS EPM, time and date stamping of electronic files, and content verification capability, does not bring it within the bounds set by that rule, which would require USPS EPM to be ancillary to the carriage of correspondence by the Postal Service. Incidental carriage as correspondence of electronic files to which a USPS

EPM has been applied is not conducted by the Postal Service. The complaint should be determined to be unjustified.

**I. THE COMMISSION LACKS STATUTORY AUTHORITY TO RESOLVE A CHALLENGE TO THE POSTAL SERVICE'S DETERMINATION NOT TO SEEK A RECOMMENDED DECISION FOR A NEW SERVICE ALLEGED TO BE A "POSTAL" SERVICE.**

The Postal Service understands that the Commission has previously considered its arguments regarding the Commission's authority to grant complainant the relief sought. Order No. 1455 (March 3, 2006) at 8-12. Since it is the view of the Postal Service that the Commission fundamentally lacks the authority to address this matter, however, it is necessary at this juncture to once again reiterate its positions, lest they subsequently be deemed to have been waived. Moreover, some of the arguments proffered in Order No. 1455 by the Commission in response to the Postal Service's earlier pleadings were not well-founded.

Section 3662, the rate and service complaint provision of the Act, states:

Interested parties who believe the Postal Service is charging rates which do not conform to the policies set out in this title or who believe that they are not receiving postal services in accordance with the policies of this title may lodge a complaint with the Postal Rate Commission in such form and in such manner as it may prescribe. . . .

39 U.S.C. § 3662. Because DigiStamp makes no allegations regarding postal services that it is "receiving," the "service" portion of section 3662 is plainly not relevant.<sup>1</sup>

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<sup>1</sup> Order No. 1455 (at page 9) attempts to gloss over the fact that even DigiStamp has not purported to initiate a service complaint about the level of postal services it is receiving. By the very terms of the statute, a service complaint can only be initiated by a user of the mail, not a competitor. A dispute over whether an activity is a postal service or nonpostal service is not a dispute about the level of postal "services" under the second clause of section 3662, notwithstanding the coincidental presence of the same word "service." The word "service" has two entirely distinct meanings in the two different contexts.

Instead, what DigiStamp seeks to initiate is a "rate" complaint. Rate complaints were intended to allow interested parties to challenge the rates being charged, presumably in accord with previous action by the Commission and the Governors, for existing postal services. The gravamen of the complaint, however, involves not the matter of the rates that are being charged, but whether the Postal Service acted lawfully when offering USPS EPM without a recommended decision from the Commission.

All three claims in the complaint rest directly on the erroneous postulation that USPS EPM constitutes a "postal" rather than a "nonpostal" service.<sup>2</sup> In essence, DigiStamp is seeking from the Commission nothing more than a declaration that USPS EPM is a "postal" service, the unilateral establishment of which is beyond the statutory powers of the Postal Service. Yet there is nothing in the language of section 3662 which suggests any intent on the part of Congress to grant the Commission the authority to declare independent actions of the Postal Service to be either lawful or unlawful. The subject of a rate complaint was intended to be "rates," not the issue of whether or not a service had been lawfully established. DigiStamp is seeking from the Commission something which the Commission has no authority to grant under the plain language of section 3662.<sup>3</sup>

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<sup>2</sup> Thus, the first claim of DigiStamp (¶¶17-24) is without merit because the Postal Service is not required to request a recommended decision from the Commission on rate or classification provisions relating to a "nonpostal" service; and the second claim (¶¶30-47) is without merit because section 3622(b) does not apply to a "nonpostal" service. The Commission has already dismissed the third claim. Order No. 1455 at 19-20.

<sup>3</sup> The insistence in Order No. 1455 (page 10) that the Postal Service has mischaracterized the DigiStamp complaint is erroneous. The relief sought by DigiStamp is neither recommendation of a different rate for EPM, nor recommendation of classification provisions for EPM, but rather "a recommended decision rejecting as unsupported the Postal Service's provision of Electronic Postmark" (¶ 57.a). This is

If this matter is reviewable, a United States district court is the appropriate forum for a party challenging unilateral action of the Postal Service, including the implementation of new services or rates without participation by the Commission. This conclusion is supported by the contemporaneous interpretation of the statutory scheme in the years immediately following postal reorganization. During that period, the Postal Service initially took the position that all special services were "nonpostal" and were excluded from Commission jurisdiction. Accordingly, the Postal Service proposed to implement special service fee changes unilaterally. Rather than file a complaint with the Commission under section 3662, challenging parties took the Postal Service to district court, seeking a determination that no fee changes for those services could be implemented without a recommended decision from the Commission. In that instance, the court sided with the challengers, and ruled that each of the services in question was a "postal" service, and thus under the jurisdiction of the Commission.<sup>4</sup> Clear precedent therefore exists that district courts are available to address and resolve the exact issue upon which the DigiStamp complaint must hinge.<sup>5</sup>

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exactly the type of declaratory relief which the Postal Service correctly argued in its Motion to Dismiss is beyond the Commission's statutory authority under section 3662.

<sup>4</sup> *Associated Third Class Mail Users v. US Postal Service*, 405 FSupp 1109, 1115-118 (DDC 1975) (hereinafter *ATCMU*), *affirmed*, *National Assoc. of Greeting Card Publishers v. US Postal Service*, 569 F2d 570, 595-598 (DC Cir 1976) (hereinafter *NAGCP I*), *vacated on other grounds*, *US Postal Service v. Associated Third Class Mail Users*, 434 U.S. 884 (1977).

<sup>5</sup> Furthermore, another alleged competitor, UPS, has gone to district court, rather than file a complaint with the Commission, in earlier instances in which it was alleging that the Postal Service was illegally offering an experimental service without first seeking the necessary recommended decision from the Commission. *UPS v. US Postal Service*, 455 FSupp 857 (ED Pa 1978), *aff'd* 604 F2d 1370 (3d Cir 1979), *cert. denied*, 446 US 957 (1980). There is no reason why DigiStamp should not have followed the same procedure in this instance.

In the past, the Commission itself has had occasion to redirect parties initiating complaints under section 3662 to district court. In Commission Order No. 724 (Dec. 2, 1986), the Commission declined to consider in a complaint case whether a Domestic Mail Manual (DMM) provision promulgated by the Postal Service was illegal because it had not first been submitted to the Commission as a proposed Domestic Mail Classification Schedule (DMCS) change. The Commission observed that district courts "have several times heard complaints that the Service has 'classified' mail without invoking Commission procedures." *Id.* at 13. In this case, DigiStamp is making exactly such an allegation -- claiming that the Postal Service unlawfully created a new mail classification (*i.e.*, USPS EPM), without invoking Commission procedures.

In Order No. 724, the Commission also suggested the types of problems that could develop were it to attempt to adjudicate whether the Postal Service had improperly taken action without fulfilling an obligation to consult the Commission:

First, it appears that the right forum for determining the validity of a Postal Service rule, purportedly issued under its independent administrative powers, would be a United States District Court. . . . As an abstract matter, we could resolve such a question. However, if we found the rule invalid, lacking general equitable powers, we could not enjoin enforcement of the rule or require an accounting of postage collected under it.

*Id.* at 11<sup>6</sup>. These comments foreshadowed the impasse that developed in the Pack & Send complaint case, Docket No. C96-1, when the Commission, although concluding that the pilot service should not have been offered without invoking Commission procedures, lacked general equitable powers to enjoin the Postal Service from continuing to offer the service. This circumstance created the situation in that case, in which the Commission found the complaint to be justified, but refused to issue a recommended decision upon which the Governors could act, despite the plain language of section 3662 and its own Rule 87, both of which require a recommended decision under those circumstances.<sup>7</sup> The way to avoid such an impasse, consistent with the

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<sup>6</sup> The arguments presented in Order No. 1455 to attempt to distinguish what the Commission said and did in Order No. 724 indicate some apparent confusion about the earlier proceeding (Docket No. C86-2). In that proceeding, the complainant sought what the Commission itself characterized as a “declaratory order” by requesting the Commission to find that “the complained-of regulation ... constitutes an unauthorized act of reclassification by the Postal Service in derogation of Title 39 U.S.C. Section 3623.” Order No. 724 at 11. The Commission responded as quoted above, pointing to the court as the “right forum.” *Id.* On that basis, the Commission ordered that the scope of the subsequent classification proceeding it was initiating “shall not include consideration or decision of the question whether the Postal Service’s final rule is unlawful, ultra vires, or void.” *Id.* at 14. It is, therefore, entirely unclear on what basis the Commission in footnote 24 of Order No. 1455 claims that it “did decide the jurisdictional issue in that proceeding, the very result that DigiStamp urges in this proceeding.” In fact, DigiStamp is alleging “unlawful classification action” and seeking a declaratory order of exactly the same type that the Commission left open for a court to decide in Order No. 724, just as argued in the Postal Service’s Motion to Dismiss.

<sup>7</sup> In the Pack & Send case, the Commission elected to issue what it chose to call a “Declaratory Order,” rather than the recommended decision required by statute, on the grounds that “a recommended decision simply declaring that Pack & Send is a postal service, and thus subject to the Commission’s jurisdiction, would be a hollow vessel lacking any recommendation of substance upon which the Governors could act under § 3625.” Commission Order No. 1145 at 24 (Dec. 16, 1996). By this statement, the Commission implicitly acknowledged that the only remedy authorized within the context of a section 3662 rate complaint, to issue a recommended decision, does not encompass authorization to adjudicate complaints of the exact variety presented in this instance. Just as the Commission suggested in the above-quoted portion of Order No. 724, the lack of general equitable powers precludes the expansion of section 3662

comments made by the Commission in Order No. 724, is to leave the matter for the district court.

In their Decision in the Pack & Send case, the Governors stated that they "do not concede that section 3662 gives the Commission jurisdiction to review new products and services to establish their status as postal or nonpostal services." Decision of the Governors of the United States Postal Service on the Recommended Decision of the Postal Rate Commission on the Complaint of the Coalition Against Unfair USPS Competition, at 4, Docket No. C96-1 (April 8, 1997) (hereinafter "Gov. Dec. C96-1"), 62 Fed. Reg. 23,813. The experience of the Pack & Send case demonstrates why the limited authority granted the Commission in section 3662 rate complaint cases does not extend to challenges to new products based on their status as postal or nonpostal services. Authority to entertain legal challenges to the validity of independent actions of the Postal Service falls, if anywhere, within the province of the district courts, not the Postal Rate Commission. The Commission should have dismissed the instant complaint on the grounds that the Commission lacks authority to resolve the claims that DigiStamp has made. Notwithstanding the current posture of the proceeding, that deficiency still calls for immediate termination of the docket.

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complaints to questions concerning the validity of unilateral actions of the Postal Service.

**II. EVEN ASSUMING THE COMMISSION IS AUTHORIZED TO ANSWER THE QUESTION OF WHETHER USPS EPM IS A POSTAL OR NONPOSTAL SERVICE, THE COMPLAINT IS UNJUSTIFIED BECAUSE THE SERVICE IS CLEARLY A NONPOSTAL SERVICE.**

Even assuming that the Commission is authorized to answer the question of whether USPS EPM is a postal service for purposes of chapter 36 of title 39, Digistamp's evidence does not show that USPS EPM is a "postal service" for purposes of sections 3622, 3623, and 3662 of title 39, United States Code. DigiStamp contends that the service is a "postal service" for which the Postal Service must request a recommended decision on the product's rate and classification from the Commission in accordance with the criteria of sections 3622 and 3623. This conclusion has no basis in the plain language or subsequent interpretation of the Act; consequently, the Complaint is not justified.

**A. The Courts, the Commission, and the Governors Have Properly Evaluated The Postal Character Of Services According To Their Relationship To Hardcopy Postal Networks.**

The Postal Reorganization Act limits the ratemaking procedures of chapter 36 of title 39, United States Code, to "postal" services. The Act provides that the Postal Service, "shall request the Postal Rate Commission to submit a recommended decision on changes in a rate or rates or in a fee or fees *for postal services* if the Postal Service determines such changes would be in the public interest and in accordance with the policies of this title." 39 U.S.C. § 3622 (emphasis supplied). Rates for "postal" services are to be distinguished from those for "nonpostal" services, which Congress gave the Postal Service unilateral authority to provide. Specifically, section 404(a)(6) of Title 39, United States Code, provides:

Without limitation of the generality of its powers, the Postal Service shall have the following specific powers, among others:

...

(6) to provide, establish, change, or abolish special nonpostal or similar services;

39 U.S.C. § 404(a)(6).<sup>8</sup>

In determining whether a particular service is a postal service within the meaning of section 3622, the primary controlling precedents are two judicial opinions, *ATCMU* and *NAGCP I*, and several opinions by the Commission and the Governors in Docket Nos. R76-1, C95-1, and C96-1. Absolutely none of these authorities has concluded that completely electronic services are “postal” in nature; rather, all of the authorities that have considered the question of what is a “postal service” have concluded that such services must bear, at minimum, some relation to hardcopy postal delivery networks.

### **1. *ATCMU***

The underlying controversy in *ATCMU* concerned the postal character of a variety of special services.<sup>9</sup> The court found the services it reviewed to be postal

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<sup>8</sup> The absence of a comma between “special” and “nonpostal” appears to be an oversight. The *ATCMU* court read section 404(a)(6) to include a comma between “special” and “nonpostal:”

Section 404(6) gives the Postal Service the power “to provide, establish, change, or abolish special[,] nonpostal or similar services.”

<sup>9</sup> The services in question were: (1) the furnishing of mail list corrections; (2) the privilege of prepayment of postage without stamps; (3) the forwarding or returning of undeliverable mail; (4) the registry of mail; (5) the insurance of mail; (6) the provision of COD mail; (7) the certification of mail; (8) the securing of a signed receipt upon the delivery of mail and the returning of it to the sender; (9) special delivery; (10) the special handling of mail; and (11) the provision of money orders. 405 F. Supp. at 1115. The provision of money orders was noted by the court to be an exception to its reasoning. The provision of postal money orders is the only service which falls outside the framework of analysis generally used by the two courts and the Commission. The district court held that the provision of money orders was a postal service, although it noted that this conclusion was based on an exception to its general reasoning. The court supported its determination to include money orders on several grounds. First, it

services because they are “very closely related to the delivery of mail.” The court stated its opinion that “all of these services would be considered ‘postal services’ in ordinary parlance.” *ATCMU*, 405 F. Supp. at 1115.

## **2. *NAGCP I***

In reviewing the district court’s decision in *ATCMU*, the Court of Appeals for the District of Columbia Circuit noted that it did not adopt all of the district court’s reasoning, but found its interpretation of the Act persuasive and its holding legally correct and adequately supported. *NAGCP I*, 569 F.2d at 596-97. The court did not specify, however, any areas of disagreement with the district court’s reasoning. Like the district court, the Court of Appeals began by “[g]iving ‘postal services’ a plain meaning,” and concluded that the services at issue “may reasonably be so classified.” The court stated that “each clearly involves an aspect in the posting, handling and delivery of mail matter.” The Court of Appeals summarized its holding as agreement “with the district court that a plain reading is the proper reading of § 3622: ‘postal services’ as used there is a generic term and was meant to include all the special services here at issue.” *Id.* at 596-97.

## **3. Docket No. R76-1**

In Docket No. R76-1, the Commission had the district court’s opinion in *ATCMU* before it when it determined whether it would recommend fees for a number of services.

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noted that the majority of money orders sold at post offices are actually sent by mail. The court also included postal money orders as a service that would be considered postal services in ordinary parlance. *ATCMU*, 405 F. Supp. at 1115. The Court of Appeals also recognized that money orders was the “one possible exception” to its reasoning regarding what is and is not a postal service. The Court of Appeals, like the district court, relied on the fact that the “great majority of these are sent through the mail” and that the provision of money orders may be viewed as “intimately a part of postal services.” *NAGCP I*, 569 F. 2d at 596.

The Commission began by dividing the menu of services offered and sold by the Postal Service. PRC Op., R76-1, Vol. 2, App. F at 3-5 (hereinafter “App. F”).<sup>10</sup> The Commission first distinguished between services that provide “actual carriage (i.e., collection, transmission and delivery) of mail matter” and “all other services performed by the Postal Service.” App. F at 1-2. The Commission identified two subdivisions within the “other services” category, including “services rendered to the public” and “services performed by the Postal Service for other agencies of the United States.” App. F. at 2. The latter, in the Commission’s view, were “in no sense” considered postal services. Within the former category, the Commission distinguished between “jurisdictional from nonjurisdictional” services. App. F at 2-3. The distinction between these categories was quite simply:

the relationship of the service to the carriage of mail. Those which can fairly be said to be ancillary to the collection, transmission, or delivery of mail are postal services within the meaning of § 3622. A change of fees

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<sup>10</sup> The Commission expressed serious reservations concerning the district court’s holding, later affirmed by the Court of Appeals, that the sale of postal money orders is a postal service: “We think it not unlikely that, with all due respect to the District Judge, a somewhat stricter standard of jurisdiction would be appropriate. . . . We are inclined to doubt the jurisdictionality of money orders because of their lack of intrinsic connection with the carriage of mail.” App. F at 12. The Commission expressed the hope that it would have an opportunity to reconsider its adherence to the court’s precedent in the future. *Id.* In its analysis, the Commission noted that the district court (and unbeknownst to it at the time, subsequently the court of appeals as well) based its conclusion at least in significant part on the fact that the vast majority of money orders were sent by mail: “The connection [the district court] found between money orders and the carriage of mail was thus statistical, rather than structural (as was the case with the other special services before [the court]).” App. F at 11. In its analysis of the nature of the sale of postal money orders, the Commission expressed an additional concern: that the availability of alternative money orders from private businesses might constrain the price charged by the Postal Service, leading to cross-subsidization by other services. Although the Commission noted that the benefit would inure to those members of the public not having access to alternative money order services, it expressed no opinion as to whether it would countenance this hypothetical cross-subsidization.

for any of these services would therefore be a proper subject of a recommended decision.

*Id.* at 3.

Thus, the test the Commission employed to determine the postal character of services at issue in R76-1 was in essence the relationship the relevant service or product had to the carriage of mail in the collection, transmission, or delivery function. App. F at 7-25. Using this test, the Commission concluded that philatelic products, photocopy service, retail products, record retrieval, vending machines, sexually oriented advertising exemption lists, bulletin boards, and notary services were not postal services because they bore little relation to the actual carriage of mail. *Id.*

#### **4. Docket No. C95-1**

The Commission employed the *ATCMU* legal standard to evaluate the services at issue in Docket Nos. C95-1. In that proceeding, the Commission dismissed a complaint challenging planned increases in the shipping and handling charges for orders placed with the Postal Service Philatelic Fulfillment Service Center catalog sales program. The Postal Service moved to dismiss the proceeding, primarily on the ground that, “the subject matter. . . concerns philatelic services which are not within the scope of 39 U.S.C. § 3662.” Motion of the United States Postal Service to Dismiss Proceeding, April 13, 1995, at 2 (footnote omitted). The Commission concurred with the Postal Service’s primary jurisdictional argument and dismissed the complaint. The Commission resorted to the legal standard in the *ATCMU* decision in disposing of the Complaint:

Applying the rationale of the District Court to the facts involved in the present complaint, the Commission finds that the services involved—the handling and shipping of catalog orders placed with the Philatelic Fulfillment Service Center—are not closely related to the delivery of mail

and, therefore, the charges for such services do not constitute ‘fees for postal services’ within the scope of section 3662 of title 39, United States Code.

PRC Order No. 1075 at 5 (September 11, 1995).<sup>11</sup>

### **5. Docket No. C96-1**

In Docket No. C96-1, the Commission was confronted with a Complaint alleging that classification and fees for the Postal Service’s Pack & Send product were subject to evaluation by the Commission. In that proceeding, the Commission issued a “declaratory order” concluding that Pack & Send service was a postal service. The Commission arrived at this result by measuring the relationship of the service to the carriage of mail. PRC Order No. 1145 at 11-12, 19. The Commission explained:

The courts have stated that the fundamental inquiry to be made is whether the service under scrutiny is a “postal service” in ordinary parlance, the “plain meaning” of which is established by reference to the routine postal functions of accepting, handling and delivering mail matter.

PRC Order No. 1145 at 12. The Commission then applied this standard in evaluating Pack & Send’s postal character:

Pack & Send service has a direct structural relationship to the provision of postal services. Intrinsically, it is a value-added service available for the categories of parcel service provided by the Postal Service; the locus of the added value is the alternative form of acceptance it provides. For this reason, Pack & Send is a service “other than the actual carriage of mail but supportive or auxiliary thereto[,]” which “enhance[s] the value of service rendered under...substantive mail classes[,]” and thus satisfies the general criterion for “postal” services formulated by the Commission in Docket No. R76-1. PRC Op. R76-1 at 267. In common parlance, as well as under these more analytical legal tests, it is a postal service.

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<sup>11</sup> Complainant subsequently petitioned for reconsideration of the Commission’s determination to dismiss the Complaint. The Commission denied his motion in PRC Order No. 1088 (November 15, 1995).

PRC Order No. 1145 at 19. The Commission reaffirmed its conclusions in Order No. 1156, where it rejected a motion by the Postal Service to reconsider Order No. 1145.

The Governors construed Order Nos. 1145 and 1156 in Docket No. C96-1 as a recommended decision and rejected them. Gov. Dec. C96-1. Although the Governors questioned the Commission's use and application of the analytical tests the Commission employed to arrive at its conclusion, the Governors suggested that, consistent with *ATCMU* and *NAGCP I*, the relevant inquiry is whether the service "bear[s] any substantive relationship to mail in an operational sense." Gov. Dec. C96-1, 62 Fed. Reg. 23,816.

Notwithstanding the differing views presented by the Governors and the Commission in Docket No. C96-1, both bodies have consistently resorted to the legal standards of the *ATCMU* and *NAGCP I* opinions to evaluate the postal character of services offered by the Postal Service.<sup>12</sup> But as discussed next, there is no relationship between USPS EPM and traditional postal functions. Digistamp's Complaint does not support any other conclusion.

**B. USPS EPM Bears No Relationship To Routine Postal Functions That Are the Hallmark of Postal Services**

USPS EPM is a totally electronic service. Because it lacks any hard copy element, customers of USPS EPM make no use of the mail services traditionally offered by the Postal Service, such as collection, acceptance, processing, handling, transportation, and delivery functions maintained and operated by the Postal Service.

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<sup>12</sup> The Governors stated that they do not "endorse [the public effect standard] as a guide to future policy, or as a test of the Postal Service's or the Commission's jurisdiction." Gov. Dec. C96-1, 62 Fed. Reg. 23,816.

Customers of the service need never touch or interact with a collection box, mailbox, or postal retail unit to conduct USPS EPM transactions. In fact, customers *cannot* interact with the components of the hardcopy delivery network. Customers of the USPS EPM service can only interact with the Postal Service through a computer link to the internet, or by use of a dedicated USPS EPM server. There is no USPS EPM “retail” option, in which a visit to the local post office offers an alternative mode of gaining access to the service. The separation between physical postal services and USPS EPM is absolute and comprehensive.<sup>13</sup>

As an all electronic service, USPS EPM is not “very closely related to the delivery of mail.” *Cf. ATCMU*, 405 F. Supp. at 1115; *see also* PRC Order No. 1075 at 5. USPS EPM, moreover, involves no aspect of the “posting, handling, and delivery of mail matter,” *cf. NAGCP I*, 569 F.2d at 596-97, or, similarly, to the “routine postal functions” of “accepting, handling and delivering mail matter,” *cf. PRC Order No. 1145* at 12. Furthermore, unlike Mailing Online and E-COM, USPS EPM does not involve communications that begin electronically but are later converted to hardcopy form for delivery. Thus, as an unbundled completely electronic service, USPS EPM cannot be “ancillary to the collection, transmission, or delivery of mail.” *Cf. App. F* at 3-5. It is unimaginable how USPS EPM could be said to “bear any substantive relationship to mail in an operational sense” under these circumstances. Furthermore, USPS EPM bears no relationship to existing postal services, under either a “structural” analysis or

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<sup>13</sup> The notion that USPS EPM is an entirely electronic service that is totally separate from traditional hard-copy postal services and operations seems intuitively obvious and does not appear to be contested on the record. Nevertheless, to the extent one seeks citation to evidentiary support for this proposition, please see the discussion *infra* summarizing in detail the functional structure of the USPS EPM service.

“statistical” measurement standard, since it does not complement existing hardcopy communications in any way. *Cf.* PRC Order No. 1145 at 15-18. Consequently, under the only applicable definition of postal service endorsed by the courts, USPS EPM cannot possibly be considered a “postal service,” and therefore must be a “nonpostal service” as that term is used in title 39, United States Code.

**C. Adoption By the Commission of a New Definition of Postal Service Cannot Change the Result in This Case**

As demonstrated above, USPS EPM is not a “postal service,” as it does not fall within any of the definitions of postal services previously relied upon by the courts, the Commission, or the Governors. It is not a postal service “in ordinary parlance.” While DigiStamp may wish to take some comfort from a new definition of postal service promulgated by the Commission earlier this year in Docket No. RM2004-1 (Order No. 1449, January 4, 2006), that new definition provides no proper basis to justify the complaint.

**1. Reliance by the Commission on Its New Rule Would Constitute Improper Retroactive Agency Action**

It is well established that, absent specific authority to do so, administrative agencies are not free to change the rules in the middle of the game. A case which sums up the salient legal standards is *National Mining Assoc. v. Department of Labor*, 292 F3d 849 (DC Cir 2002) (hereinafter *NMA*):

An agency may not promulgate retroactive rules absent express congressional authority. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988). A provision operates retroactively when it "impairs rights a party possessed when he acted, increases a party's liability for past conduct, or imposes new duties with respect to transactions already completed." *Landgraf v. USI Film Prods.*,

511 U.S. 244, 280, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994). In the administrative context, a rule is retroactive if it " 'takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.' " *Nat'l Mining Ass'n v. United States Dep't of Interior*, 336 U.S. App. D.C. 134, 177 F.3d 1, 8 (D.C. Cir. 1999) (quoting *Ass'n of Accredited Cosmetology Sch. v. Alexander*, 298 U.S. App. D.C. 310, 979 F.2d 859, 864 (D.C. Cir. 1992)). The critical question is whether a challenged rule establishes an interpretation that "changes the legal landscape." *Id.* (quoting *Health Ins. Ass'n of Am., Inc. v. Shalala*, 306 U.S. App. D.C. 104, 23 F.3d 412, 423 (D.C. Cir. 1994)).

*NMA*, 292 F3d at 859.

The court in *NMA* found that retroactivity problems are not alleviated merely by attempting to label a new rule as procedural:

Rather than rely on "procedural" and "substantive" labels, a court must "ask whether the [regulation] operates retroactively." *Id.* This inquiry involves a "commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.' " *Martin*, 527 U.S. at 357-58 (quoting *Landgraf*, 511 U.S. at 270). Thus, where a rule "changes the law in a way that adversely affects [a party's] prospects for success on the merits of the claim," it may operate retroactively even if designated "procedural" by the Secretary. *Ibrahim v. District of Columbia*, 341 U.S. App. D.C. 63, 208 F.3d 1032, 1036 (D.C. Cir. 2000).

*Id.* at 859-60.

The *NMA* court explained its approach to the determination of whether a new rule changed "the legal landscape":

In analyzing each new regulation, we first look to see whether it effects a substantive change from the agency's prior regulation or practice. If a new regulation is substantively consistent with prior regulations or prior agency practices, and has been accepted by all Courts of Appeals to consider the issue, then its application to pending cases has no retroactive effect. If a new regulation is substantively inconsistent with a prior regulation, prior agency practice, or any Court of Appeals decision rejecting a prior regulation or agency practice, it is retroactive as applied to pending claims.

*Id.* at 860.

And the *NMA* court makes perfectly clear that a new rule which changes the legal landscape may not be applied to cases pending at the time when it was adopted:

Such rules change the legal landscape as applied to cases that were pending when the regulations were promulgated. *See National Mining*, 177 F.3d at 8 (explaining that "where before there was 'a range of possible interpretations,' " of the relevant statutes, a rule may establish " 'a precise interpretation' " that changes the legal landscape) (citing *Health Ins. Ass'n*, 23 F.3d at 423-24). . . . Thus, to the extent that a new rule reflects a substantive change from the position taken by any of the Courts of Appeals and is likely to increase liability, that rule is impermissibly retroactive as applied to pending claims.

*Id.* The same result has been reached in other cases as well. *See, e.g., Rock of Ages Corp. v. Secretary of Labor*, 170 F3d 148, 158 (2d Cir 1999).

Applying the principle of retroactivity in this case is very straightforward. The previous legal landscape, as demonstrated at length above, defined a "postal" service by reference to its relationship to routine postal operations and traditional postal products. That was the landscape embraced by the Commission, the Postal Service, and the courts. It was the legal landscape as it existed at the time that DigiStamp filed its complaint in February, 2004, charging that the Postal Service had violated the Postal Reorganization Act by offering what it alleged was a postal service, USPS EPM, without seeking a recommended decision from the Commission authorizing such a service. While the DigiStamp complaint was pending, on January 4, 2006, the Commission, in Order No. 1449, issued a final rule that was affirmatively intended to alter the legal landscape – the relationship to the physical postal network would no longer be the touchstone for distinguishing postal from nonpostal services, because a new definition of postal service was adopted under which electronic communication services offered

by the Postal Service would be considered to be postal services. This new regulation was substantively inconsistent with prior agency practice, and therefore cannot be applied to cases pending at the time of its adoption, such as the instant complaint case. To do so would, at least potentially, allow the creation and imposition of a new duty and obligation (to seek a recommended decision from the Commission) on a transaction that was already past (the initiation of USPS EPM in its current configuration in 2003). Therefore, whether the new definition would make a difference in the Commission's resolution of the DigiStamp complaint is irrelevant, as the principle of impermissible retroactivity precludes the Commission from relying on the new definition in this proceeding.

**2. Even Assuming *Arguendo* that the New Rule Could be Applied, USPS EPM Is Still Not a Postal Service**

The Commission has made clear that, even under its new definition, not all purely electronic services are postal services:

Nevertheless, inclusion of [certain electronic ] services in the definition should not be read as a conclusion that all such services are jurisdictional; only such services that entail correspondence become postal services.

Order No. 1424, Docket No. RM2004-1 (Nov. 12, 2004) at 4. Moreover, not only must the electronic service entail correspondence, but it also must entail correspondence carried by the Postal Service. The qualifier "by the Postal Service" appears directly in the new definition. Therefore, in order to be a postal service under the Commission's expanded definition incorporated into Rule 5(s), an electronic service must either directly consist of the carriage of correspondence by the Postal Service, or be ancillary to a service which consists of the carriage of correspondence by the Postal Service. At

its core, USPS EPM does not meet the definition as either a direct postal service, or as an ancillary postal service. The following sections explain this conclusion in more detail.

**a. History of USPS EPM**

The Postal Service first began exploring the offering of a value-added service for digital content in 1991. Tr. 1/ 52, Ins 4-6. Even at that early date, the term “electronic postmark” was used and the service was “clearly described” as a secure time and date stamp applied to electronic messages and documents. Tr. 1/52, Ins 8-11. By 1995, the Postal Service was testing the idea, in focus groups, of electronically time and date stamping electronic files. Tr.1/52, Ins 19-22. At about the same time, the Postal Service was publicly announcing efforts to provide a value-added service which would give evidence of the time and date of electronic files, as well as whether they had been altered after the time and date stamp was applied. Tr. 1/52B, Ins 10-12. These public discussions and speeches continued throughout the 90s. Tr. 1/53B, Ins 1-4. By 1996, the Postal Service had developed a system that:

successfully applied a secure time and date system to any electronic document directed to the EPM server. This time and date utilized the ‘correct time’ distributed via satellites from the National Institute of Standards and Technology’s atomic clocks in Boulder, Colorado.

Tr. 1/52B, Ins 16-19. Prior to this, the Postal Service’s role as a likely provider of secure third party authentication had been discussed in a number of venues, including a publication by the American Bar Association. DS/USPS-RT-1-4(3), Tr. 1/72.

The first version of the system was demonstrated in early 1996. Tr. 1/53, Ins 7-10. By 1997 the Postal Service was actively marketing the USPS EPM. Tr. 1/53B, Ins 11-19; OCA/USPS-RT1-13, Tr. 1/122-132. A working service has been provided since

the late 1990s, Tr. 1/224, Ins 10-11, although USPS EPMs at that time were provided with the assistance of a different contractor from the one currently working with the Postal Service. Tr, 1/233, Ins 1-6.

In 2001 the Postal Service decided to restructure the way in which it was offering the USPS EPM in an attempt to find a partner which would be able to create products and services faster than the Postal Service, with more efficient technical and customer support. Tr. 1/55B, Ins 6-10. In October 2001, the Postal Service published a Request for Information (RFI) in the Commerce Business Daily for partners in providing the USPS EPM to the public. OCA/USPS-RT-17, Tr. 1/155. After evaluating the responses, Authentidate, Inc., was selected to provide the USPS EPM service. Tr. 1/55B, Ins 10-13.

**b. Description of USPS EPM.**

The USPS EPM is an implementation of Public Key Encryption techniques.<sup>14</sup>  
The EPM protects the integrity of electronic data through the use of auditable time

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<sup>14</sup> Public-key algorithms (also called asymmetric algorithms) are designed so that the key used for encryption is different from the key used for decryptions. Further more, the decryption key cannot be calculated from the encryption key. The algorithms are called “public-key” because the encryption key can be made public: A complete stranger can use the encryption key to encrypt a message; but only a specific person or entity with corresponding decryption key can decrypt the message. In these systems, the encryption key is often called the public key, and the decryption key is often called the secret key.

Encryption using public key  $K$  is denoted by:

$$E_k(M)=C$$

Even though the public key and private key are different, decryption with the corresponding private key is denoted by:

$$D_K(C) = M$$

stamps, digital signatures, and hash codes. OCA/USPS-RT1-2, Tr, 1/75. A key advantage of this technology is that it bypasses the need to limit electronic commerce to highly structured transactions between well known and trusted parties, in order to provide an effective legal framework for business use. OCA/USPS-RT-6, Tr, 1/98. The USPS EPM signs a “hash code” of an electronic file using an anonymous protocol which transforms the file into a unique “fingerprint” that cannot be reconstructed into the original file. OCA/USPS-RT1-2, Tr. 1/82. (An “anonymous” protocol is an encryption method that does not provide any information as to who “hashed” the file; the addition of a digital signature can provide that information.) In almost all cases, the encryption of the electronic file into a hash is not done at a Postal Service computer, but at the client, or local, computer level. Tr. 1/58, Ins 4-6; Tr. 1/228, In 3. The hash code is then digitally signed by the private encryption key of the Postal Service, with the time and date of signing, such that the result can be read by the public key corresponding to the Postal Service’s private key to determine that the digital signature actually came from a secure postal server, and whether the contents had been altered in anyway. Tr. 1/58-59. This verification is done by performing the hash encryption function on the USPM EPM postmarked document once again, and comparing the result to the hash code stored by the Postal Service. The Postal Service never takes control of the underlying document. Tr. 1/176, Ins 1-4. Even when used as a component of a messaging application, the underlying document itself is never under the control of the Postal Service. Tr. 1/180, Ins 19-20; Tr. 1/181, Ins 12-13.

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Sometimes, messages will be encrypted with the private key and decrypted with the public key, this is used in digital signatures. Bruce Schneier, *Applied Cryptography*, 4-5 (2<sup>nd</sup> ed, John Wiley & Sons, 1996).

**c. The USPS EPM is not a communication service.**

The USPS EPM is a computer process designed to work with any electronic file submitted to the USPS EPM server, for whatever purpose. The record is overwhelming on this point. In the technical description of the USPS EPM in witness Foti's testimony, it is clear that electronic content can be created from any application, and the USPS EPM creates a hash code of the electronic file, whatever it's purpose or origin. Tr. 1/58-59. Witness Foti explained that the basic purpose of the USPS EPM was to insert "one piece of technology into a larger one for the benefit of both systems, and hence adding value for all customer applications." Tr. 1/53, Ins 16-21. Therefore, it is useful for many applications, which is why as early as mid-1997 it was integrated with a Certificate Authority System for digital signatures. *Id.* at Ins 20-21.

The USPS EPM is used for the authentication of electronic files, data, and documents which have been reduced to a hash code. It is, of course, potentially useful for the authentication of email, but that is not its only, or primary, use. And it is useless for communication of email without a non-Postal Service provider. Tr. 1/191, Ins 10-15. The USPS EPM functionality of authenticating an electronic document when presented to the USPS EPM server is indifferent to how that document got there, or where it came from. DS/USPS-RT1-3, Tr. 1/69. And the USPS EPM can, was, and is offered in a nonweb based server applications, which can authenticate any electronic file the server presents, regardless of what further use might be made of the file. Tr. 1/287.

In fact, Witness Foti explained that the USPS EPM is essentially not being used today in the transmission of messages. DS/USPS-RT1-2, Tr. 1/67. The largest customer for the USPS EPM does not use it in a communication process. It is used as

part of their business process in order to meet governmental audit requirements. Tr. 1/167, 268. Less than one percent of current usage involves potential message applications. OCA/USPS-RT1-25, Tr. 1/166.

While the USPS EPM is potentially useful in communications applications, that is a product of its functionality, not its primary purpose. It is described as a service giving customers a way to time-stamp electronic files, providing evidence that a document or file existed at a specific time and date, and detecting the presence of any changes made to the postmarked document. DS/USPS-RT1-2, Tr. 1/68. The USPS EPM functionality of authenticating a document when presented to the server is indifferent to how the document got there, or where it came from, and the Postal Service plays no role in the communication protocol. DS/USPS-RT1-3, Tr. 1/69-70. The USPS EPM White Paper explains that the service proves document authenticity simply because a USPS EPM is associated with a document. OCA/USPS-RT1-2, Tr. 1/79, 84.

As long ago as 1996, at a Boston trade show, USPS EPM potential applications were listed as contracts, notarized documents, purchase orders, medical records, and billing information. OCA/USPS-RT1-1, Tr.1/144. All of these applications refer to auditable records, or records that might become the subject of subsequent litigation. One analogy, for one of the possible applications of the USPS EPM, is that it is simply useful in support of internal business processes, much as documents, external or internal, may be time-stamped by an administrative assistant when received. Tr. 1/215, Ins 13-14.

The complainant has focused much of his attention on one particular application of the USPS EPM, its incorporation into a Microsoft Extension for Word. Microsoft Word

is linked with Microsoft Outlook, and Microsoft Outlook can provide a return receipt function, if selected by the user. As Witness Foti explained, in this Microsoft application, use of the return receipt function is the purpose of the Microsoft application, whatever its strengths or weaknesses, but that is not the purpose of the USPS EPM. Tr. 1/190, Ins 14-16. The Microsoft Word plug-in enables a message transfer as long as the customer also has an internet service provider. The USPS EPM does not engage in that transfer. Tr. 1/194, Ins 5-7. Within the Microsoft Word extension is an application which uses as a component the USPS EPM. Tr. at 1/199, Ins 12-14.

In addition, use of this particular application feature is minimal. Messaging applications, including the return receipt feature within Microsoft Outlook, are less than one percent of all USPS EPM transactions. OCA/USPS-RT-1-25, Tr.1/166. No reasonable attempt to assess and classify the nature of the product can focus exclusively on such a *de minimis* fraction of its usage by actual customers.

Some of the confusion in the record on this subject is a result of the fact that, in the late 1990s, the Postal Service used the USPS EPM as a value added-service in conjunction with pilot services, such as NetpostCertified and PostECS. While these services have been terminated, Witness Foti pointed out that those were more message services, whereas the USPS EPM was just one component of those services that could verify that, at this date and time, a document existed and could be authenticated. Tr. 1/257, Ins 14-21.

## **CONCLUSION**

In seeking to have the Commission find that the Postal Service acted outside its statutory authority in establishing USPS EPM without seeking a recommended decision,

the complainant seeks relief which the Commission cannot provide. The Commission's authority under section 3662 was not intended to allow it to resolve such matters. Even if it were, however, under the standard prevailing at the time USPS EPM was established, a purely electronic service is clearly nonpostal. Moreover, even under the Commission's new definition of a postal service, the essence of USPS EPM is neither a direct correspondence service provided by the Postal Service, nor is it ancillary to any correspondence service provided by the Postal Service. The complaint has not been justified.

The Postal Service urges the Commission to make an expeditious decision in this matter. The term of the current Authentidate Strategic Alliance Agreement for the USPS EPM is coming to an end, and as a consequence the Postal Service will have to make some important business decisions in the near future. It would be helpful to make those decisions in the light of information about the outcome of this proceeding.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux, Jr.  
Chief Counsel, Ratemaking

Eric P. Koetting  
Joseph F. Wackerman  
Attorney

475 L'Enfant Plaza West, S.W.  
Washington, D.C. 20260-1137  
(202) 268-2992; Fax -5402  
October 6, 2006

### **CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.

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Eric P. Koetting

475 L'Enfant Plaza West, S.W.  
Washington, D.C. 20260-1137  
(202) 268-2992; Fax -5402  
October 6, 2006